IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

CWP No. **151 of 2003**

Judgment reserved on : 29.10.2007

Date of Decision : October 30, 2007

Roop Kaur & Others …Petitioners.

Versus:

State of H.P. & others …Respondents.

***Coram*:**

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] *Yes*

For the petitioners: Mr. B. S. Chauhan, Advocate.

For respondents 1 & 2: Mr. Ashok Chaudhary, Addl. A.G.

For respondent 3 : Mr. Bhupinder Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

Sanjay Karol, J.

The petitioners have assailed the order dated 22.1.2003 passed by the Commissioner (Revenue), Himachal Pradesh, dismissing the petitioners appeal assailing the order dated 26.3.2001 passed by the Collector, Solan.

Brief facts giving rise to the filing of the present petition are as under:-

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Petitioner No.1 is the mother of petitioners No. 2 to 5. Shri Prem Chand husband of petitioner No.1 and father of the other petitioners was a tenant in Shop No.4, village Dangyar, Parwanoo, Tehsil Kasauli, Distt. Solan H.P. owned by respondent No.3 and after his death the tenancy devolved upon all the legal heirs including the petitioners. The tenancy was determined vide notice dated 27.9.1997. Admitted case is that no notice was sent to petitioner No.1 Roop Kaur. The premises were not vacated, therefore, proceedings for eviction under the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (hereinafter referred to as 'the Act'), were initiated by filing the petition under the Act before the Collector, Solan. In the said petition, one of the legal heirs, namely, Smt. Rita was not impleaded as a party and Smt. Roop Kaur upon whom no notice of termination was served was arrayed as one of the respondents.

The said eviction petition No.73/13-A of 1998 instituted on 23.3.1998, was decided by the Collector in terms of his order dated 26.3.2001. This order was assailed by the petitioners before the Commissioner (Revenue), Himachal Pradesh by way of Misc. Appeal No. 37/2001 which was also dismissed on 22.1.2003 and is now the subject matter of present petition.

Learned counsel for the petitioners has assailed both the orders on the ground that no notice as required u/s 3 of the

Act was ever served upon Smt. Roop Kaur and petitioners Anuradha and Rajeev being minors ought to have been sued through natural guardian. In any case one of the legal heirs having been left out, no eviction can take place qua her. According to him, the tenancy is not common and, therefore, individual notice ought to have been served upon all the petitioners

Per contra, learned counsel for the respondents has submitted that the parties were tenants in common and, therefore, there was no need to send a separate notice to Smt. Roop Kaur as notice sent to one is sufficient to determine the tenancy for initiating eviction proceedings; Roop Kaur had filed Vakalatnama, therefore, non issuance of notice to her is a mere irregularity and not an illegality. In any event, Roop Kaur has pursued the matter all through out and no prejudice is caused to her.

Learned counsel for the petitioner has relied upon the decisions in ***Chamba District Co-Op. Marketing & Supply Fed***. v. ***State of H.P. & others*** (1999(1) Shim.LC 371), ***Shri Amarjeet Singh*** v. ***State of H.P. & others*** (2000(1) Shim.L.C. 154), ***Yash Paul*** v. ***S. S. Anand*** (AIR 1980 J&K 16), copy of judgment in RSA 75 of 1995, decided on 2.1.2007 whereas the learned counsel for the respondents has relied upon the decisions in ***Dhanapal Chetttiar*** v. ***Yesodai Ammal*** (1979(4) SCC 214), ***Ashok Chintaman Juker and others*** v.

Kishore Pandurang Mantri and another (2001(5) SCC 1), ***Bhgbandas Agarwalla*** v. ***Bhgbandas Kanu and others*** (AIR 1977 SC 1120).

I proceed to decide as under:-

In ***Bhgbandas Agarwalla*** (supra), it has been held by the Apex Court that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed ut res magis valeat quam pereat. "The validity of a notice to quit", as pointed out by Lord Justice Lindley, L. J. in Sidebotham v. Holland (1895) 1 QB 378 "ought not to turn on the splitting of a straw". It must not be read in a hyper- critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way.

The tenancy in question having been governed by the Public Premises Act, notice under Section 108 of the Transfer of Property Act was not required to be served. (***Dhanapal Chetttiar*** (supra).

In ***Ashok Chintaman Juker*** (supra) it has been held by the Apex Court that in joint tenancy, notice issued to one of the joint tenants is a valid notice and a suit instituted impleading one of them as defendant is not only maintainable but a decree passed is binding on all of them.

The ratio of law laid down in ***Yash Paul*** (supra), in my view, cannot be pressed in the facts and circumstances of

the present case. That was a case, where malafides were alleged against the State and it was also found on record that the notice stating the grounds of eviction were interpolated and no opportunity of hearing to file objections was given to the tenant, this however, is not the position in the instant case. The record shows that the notices u/s 4 of the Act were directed to be issued. No doubt, the copy of the notice which was issued /sent is not on record but the petitioners had filed a detailed reply in opposition to the ejectment proceedings and it is not their case that the ejectment order is on the grounds and facts other than the ones to which they had no opportunity to respond before the Estate Officer.

Learned counsel for the petitioners has relied upon the observations of this Court in ***Chamba District Co-Op. Marketing & Supply Fed***.(supra) to contend that the tenancy could be determined only after full compliance of the provisions of Sections 3 & 4 of the Act and as no notice as envisaged under Sections 3 of 4 was issued or received, therefore proceedings stood vitiated. This decision was clarified in ***Shri Amarjeet Singh*** (supra). The fact of the matter still remains that the provisions of Sections 3 & 4 were fully complied with as notice determining the tenancy had been served upon all the legal heirs of the original tenant except Smt. Roop Kaur who in any case was a party to the proceedings and not only who filed the reply but fully defended the ejectment.

I have perused the record. From the notice dated 27.9.1997 Ext.PW-1, it is clear that the same has not been addressed to Smt. Roop Kaur mother of all the addressees. Notices to the minors were sent in their individual capacity and not through natural guardian. In the reply dated 17.10.1997(Ext.PW-6) to the said notice as also the written statement no defence is taken that the notice is bad for non-service upon Smt. Roop Kaur or otherwise. From the record of proceedings, it is clear that notices under Sections 4 & 7 of the Act were directed to be issued to the petitioners though there is nothing on record to show as to whether the same were actually issued or not. But no objection was ever taken by the petitioners in the written statement which was filed through the very same Advocate who had sent reply (Ext.PW-6). The written statement is signed by Smt. Roop Kaur herself. From the Power of Attorney (Vakalatnama) dated 21.10.1998, it is clear that the same has been signed by Smt. Roop Kaur as guardian of minors and even Smt. Rita who was not arrayed as party has signed the same. Further, from the statement of Smt. Roop Kaur dated 26.9.2000, she has admitted that she is the tenant and her tenancy stood terminated by the landlord.

As per the provisions of Section 99 C.P.C. no decree is to be reversed, substantially varied and case remanded on account of defects or irregularity in any proceedings not affecting the merits of the case or the jurisdiction of the Court. Provisions of Order 32 Rule 2 entitle the defendants to apply for having the plaint taken off the file if the suit was not instituted without next friend of the minors. In the present case, the defendants have not taken any such steps in this regard. In fact the mother

of the minors had filed Vakalatnama, reply, appeal as there was unity of interest.

Learned counsel for the petitioners has next referred to a decision rendered by this Court in RSA No. 75 of 1995 titled as Kauran Devi v. Amar Nath and others., dated 2.1.2007 to contend that in view of the fact that the proceedings against the minors were not instituted through the natural guardian, therefore, they were not maintainable and could not be entertained. In my view, the decision is based on the fact situation which arose for consideration before the Court and is clearly distinguishable in the present case. That was the case where the Court noticed that the mother of the minors was proceeded ex-parte and, therefore, it could not be said that interest of the minors was represented. In this background, the Court rejected the action against the minors for want of appointment of guardian.

In any event, the same is an irregularity which stood waived by the present petitioners. Further, it has not been shown as to how the interest of the minors has been prejudiced. In fact to the contrary, the interest of the minors has been fully protected by the mother as all plausible pleas have been taken. Prejudice is not a matter of assumption or presumption but has to be based on substantive proof which in the present case is absent.

What emerges from the record is that notice determining the tenancy was issued and in view of the principles of law laid down by the Court in the decisions referred to hereinabove, non service of the same on Smt. Roop Kaur or service of the same upon the minors directly would not matter at all. The fact that the eviction proceedings were initiated against the minor children would not make any difference as their mother and natural guardian was on record and pursuing the interest of all. It is not the case of the petitioners that the interest of the minor was contrary to that of the mother. Non impleadment of one of the legal heirs would not vitiate the action of ejectment in view of the principles laid down by the Apex Court in ***Ashok Chintaman Juker*** (supra).

Therefore, in view of above, I see no error whatsoever in the impugned orders of the authorities below and, therefore, the writ petition fails and shall stand dismissed. No costs.

(Sanjay Karol),
Judge.

October 30, 2007.
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